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Highlights

— ICA fines Enel €93 million for abusing its dominant position in local markets for retail electricity supply.

— ICA issue €670 million fines against automotive groups for exchanging sensitive information through captive banks

The ICA focuses on the liberalization of electricity markets in Italy: the *Enel* case

On December 20, 2018, the Italian Competition Authority ("ICA") fined Enel, a multinational energy company active, among other things, in the distribution and sale of electricity in Italy, over €93 million for abusing its dominant position on certain local markets for the retail supply of electricity.[1] On the same day, the ICA issued two decisions in parallel cases concerning similar allegations against two other companies.[2]

Case Summary

In the local markets where Enel manages the distribution of electricity, Enel is also entrusted with providing (through its subsidiary Servizio Elettrico Nazionale, "SEN") an enhanced protection service ("EPS"). The EPS is a regulated regime, reserved to domestic clients and small businesses that do not opt for offers at market prices, under which electricity is supplied at a tariff set by the sector regulator. In Italy, the EPS was initially scheduled to end in July 2019, following full liberalization of the electricity market, but the deadline was recently postponed to 2020. In addition, Enel is also active in the retail supply of electricity at market prices through its subsidiary Enel Energia ("EE"). The ICA concluded that Enel, by leveraging on assets owned because of its nature as a vertically integrated operator (i.e., active in both the distribution and the retail supply of electricity), engaged between January 2012 and May 2017 in exclusionary conduct against its competitors active in the deregulated market, with a view to unlawfully favoring EE. According to the ICA, Enel's conduct had the ultimate objective of inducing its EPS customers to switch to Enel's own supply offers at market prices, also in order to avoid losing those customers to competitors when the market would be fully liberalized.

[1] *Enel/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica* (Case A511), ICA decision of December 20, 2018. The decision was published on January 8, 2019.

[2] *A2A/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica* (Case A512) and *Acea/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica* (Case A513), ICA decisions of December 20, 2018. In the *A2A* decision, the ICA closed proceedings without finding any infringement of Article 102 TFEU, while in the *Acea* decision it imposed a €16 million fine.

Some aspects of the ICA's reasoning deserve further analysis.

Enel's dominant position.

The ICA identified two relevant markets, namely, the market for the distribution of electricity and the local markets for the retail supply of electricity. It then concluded that Enel, by holding a dominant position on the market for the distribution of electricity for the areas in which it held a distribution concession, had a position of "*absolute strength*" in the same areas with respect to the EPS. Interestingly, the ICA assessed Enel's market shares in a *selection* of areas in which it provided the EPS, and inferred from this assessment that it was "*reasonable to assume*" that Enel held significantly high market shares in *each* local market (albeit not clearly identified) in which it provided the EPS.

The strategic and non-replicable assets.

The ICA found that Enel abused its dominant position by leveraging on certain assets, defined as both strategic in order to compete and impossible to replicate by non-vertically integrated competitors, namely, certain lists of customers' contact details collected by SEN, chiefly among its own EPS customers. According to the ICA, EE used the lists (purchased from SEN every year through standard agreements applicable to all potential acquirers) to address targeted offers to SEN's customers. This allegedly allowed EE to gain an unlawful advantage over its competitors in the deregulated market. According to the ICA, the contact details collected by SEN, compared to other lists available on the market, provided one additional (and strategic) information, i.e., that the customers included therein belonged to SEN's EPS.

Interestingly, SEN offered the lists also to EE's competitors (albeit only in part, as the customers were left the choice to grant consent to being contacted for commercial purposes either exclusively by the Enel group, or also by third parties). Moreover, the customers included in the lists accounted only for a very limited portion of energy clients and of SEN's overall client database (and, in addition, the lists also included the contact details of energy users who were not SEN's customers).

In the course of the investigation, the ICA dropped some of the initial allegations against Enel, namely those against: (i) alleged win-back campaigns carried out by EE to target customers who had switched to competitors active on the deregulated market; and (ii) alleged exploitation by Enel of the fact that some of its physical points of sale were shared by SEN's and EE's employees, which would have allegedly favored EE's ability to acquire customers from SEN.

The discrimination against EE's competitors.

According to the ICA, Enel abusively discriminated against EE's competitors active only on the deregulated market by allowing customers (when collecting their consent to be contacted for the purposes of proposing commercial offers) to grant differentiated consent, i.e., either exclusively to companies that were part of the Enel group, or also to third parties (which could purchase the lists of contact details from Enel). Remarkably, the ICA limited itself to looking at the alleged advantage resulting to EE from the use of the lists, while not focusing on the existence of a "*competitive disadvantage*" for EE's competitors stemming from the conduct at issue. This approach marks a departure from EU case law, which requires proof that the conduct "*without objective justification, produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers' interests*".[3]

The proof of exclusionary effects.

The ICA stated that the use of SEN's lists of contact details by EE was "*capable of excluding competitors*" active only on the deregulated market, and that, accordingly, it did not deem it necessary to provide "*evidence of the effects of the conduct*". The ICA asserted that the "*empirical evidence*" provided in the course of the proceedings (whose evidential value had been questioned by Enel) was merely intended "*to put*

[3] *Post Danmark I* (Case C-209/10) EU:C:2012:172.

the market dynamics into context". The ICA's line of reasoning is not in accordance with the well-established EU case law by which competition authorities must *prove* that conduct is at least capable of having likely exclusionary effects.[4] Even in the case of a by-object abuse (which, pursuant to the case law, does not include abusive discrimination) the EU courts require proof that the conduct is "by [its] *very nature capable of foreclosing competitors*" and require competition authorities to examine all evidence submitted by the undertaking concerned supporting the conclusion that its conduct was not capable of restricting competition.[5]

Conclusion

The *Enel* decision highlights the ICA's current focus on the upcoming liberalization of electricity and gas markets in Italy. It is reasonable to expect that, pending the full liberalization, the ICA will continue to look closely at the behavior of companies active in these markets, as also shown by the publication, in September 2018, of a handbook aimed at providing guidance to customers in connection with the liberalization process.[6]

The Italian Competition Authority issues a record-breaking fine for car sales financing cartel

On December 20, 2018, the ICA adopted its final decision in the car financing case ("Decision").[7] The ICA, which had initiated its investigation following a leniency application, found certain captive banks of automotive groups operating in Italy liable for a single, complex and continuous infringement that allegedly took place from 2003 to 2017. The ICA issued a record-breaking fine against the investigated companies of approximately €670 million in total.

Case Summary

The infringement consisted of parallel exchanges of information, which included (i) direct bilateral and multilateral information exchanges among captive banks, and (ii) indirect multilateral information exchanges among captive banks through trade associations. Independent financial firms also participated to the latter exchange, but were not considered as parties to the infringement and were not charged with any accusations. The ICA did not state that the indirect exchanges were unlawful per se, but that they were part of the single complex infringement because captive banks derived additional information.

According to the ICA, the exchange was aimed at eliminating or greatly reducing the uncertainty regarding the captive banks' respective commercial policies. The periodic exchanges encompassed data about past, present and future prices, costs and volumes of financing, and further information, which was mainly used to prepare annual budgets and marketing plans by each captive, and to regularly monitor each competitor's activities.

The ICA concluded that the infringement constituted a hardcore restriction of competition under Article 101 TFEU.

The captive banks' parent companies were also considered to be liable for the conduct of their respective captive banks, although to varying degrees.

Among the several sections of the Decision, the following two are particularly notable.

Relevant Market

The ICA identified the relevant market affected by the infringement as the market for the "*sale of cars through loans granted by captive banks (both financing activities in the strict sense and leasing)*".

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[4] *Post Danmark I* (Case C-209/10) EU:C:2012:172; *Post Danmark II* (Case C-23/14) EU:C:2015:651; and *TeliaSonera* (Case C-52/09) EU:C:2011:83.

[5] *Intel I* (Case T-286/09) EU:T:2014:547 and *Intel II* (Case C-413/14 P), EU:C:2017:632.

[6] Available at: http://www.agcm.it/pubblicazioni/2018-09_Mercato_Libero_Energia_Gas.pdf.

[7] *Car financing* (Case I811), ICA decision of December 20, 2018.

The ICA maintained that captive banks compete with each other in this market, because the cost of financing is a relevant part of a car's price and influences consumer choice. Therefore, captive banks actively participated in the competition among car manufacturers of their respective industrial groups as a fundamental marketing tool to support car sales.

The ICA considered it irrelevant that the investigated captive banks did not sell cars. Moreover, the market analysis departed from Commission and ICA precedents, which had previously identified two distinct markets (retail loans and leasing)[8] as well as the absence of competitive relationships among captive banks.[9]

Parental Liability

The ICA held that the parent companies exercised decisive influence over their respective captive banks during the infringement period, so they all belonged to a single economic entity for the purposes of competition law. Accordingly, the ICA imputed the infringement to the captive banks' parent companies, based on the parental liability doctrine.

The ICA not only maintained that parent companies were "*liable for*" the infringement, even when no substantial charge was moved against their conduct, but it clearly stated that they "*had taken part in*" the infringement.

The ICA held parent companies holding 100% (or almost all of the shares) of their subsidiary liable. For the first time at national level, it also held parent companies with much lower shareholdings, such as parent companies each having a 50% shareholding in their joint venture, liable.

However, the ICA: (i) did not fine the parent companies that did not hold 100% (or almost all of the shares) of their subsidiary; (ii) did not consider these parent companies jointly and severally liable for the infringement committed by their subsidiaries; and (iii) did not even take into account the turnover of these parent companies for the purposes of calculating the fine against their subsidiaries. The ICA justified this exception to the general rule of joint and several liability of parent companies based on the new ICA's approach at national level.

The Decision appears to suggest that the ICA's likely future enforcement policy may be harsher against parent companies, including those not holding 100% of their subsidiary. The Decision renews the debate concerning parental liability and, consequently, raises side concerns in the context of private enforcement, especially following the implementation of Directive No. 104/2014. It remains to be seen whether the national courts will clarify the scope and purposes of parental liability and endorse the ICA's approach.

Other Developments

The Council of State reduces the ICA's fine on a cement manufacturer

On December 31, 2018, the Council of State upheld the ICA's infringement decision in the Cement cartel case,[10] but significantly reduced the fine imposed on a cement manufacturer because the ICA did not take into account the turnover achieved by the undertaking concerned in the last full business year before the date of the infringement decision.[11] In line with EU case law,[12] the Council of State clarified that exceptions to the last-full-business-year rule apply only when (i) the annual accounts of the undertaking are not drawn up or disclosed to the ICA, or (ii) the relevant turnover is missing or artificially reduced.

[8] *Peugeot/Bnp Paribas/Opel Vauxhall Fincos* (Case COMP/M.8460), Commission decision of August 8, 2017; and *Intesa/Capitalia/Imi Investimenti/Unicredito/Fidis Retail* (Case COMP/M.3067), Commission decision of April 25, 2003.

[9] *DNB/Nordea/Luminor Group* (Case COMP/M.8414), Commission decision September 14, 2017; *Costituzione del gruppo bancario ICCREA* (Case C12169), ICA decision of August 1, 2018; and *Unione di Banche Italiane/Nuova Cassa di Risparmio di Chieti-Nuova Banca delle Marche-Nuova Banca dell'Etruria e del Lazio* (Case C12087), ICA decision of April 12, 2017.

[10] *Aumento prezzi cemento* (Case I793), ICA, decision of July 25, 2017.

[11] Council of State, judgment No. 7320/2018.

[12] See *Britannia Alloys & Chemicals* (Case C-76/06) EU:C:2007:326; and *Nedri Spanstaal BV* (Case T-391/10) EU:T:2015:509.

The Council of State upholds the annulment of an ICA decision concerning a tender for the supply of magnetic resonance devices to healthcare facilities

On January 14, 2019, the Council of State confirmed the first-instance court judgment and thus annulled the ICA decision,[13] which had fined four companies for bid rigging conduct in the magnetic resonance devices for healthcare facilities sector.[14] According to the Council of State, the ICA wrongly found an infringement of Article 101 TFEU, as the parties had not exchanged any sensitive information. Moreover, the Council of State, upholding the first-instance judgment, ruled out the possibility to identify a relevant market in the case at issue, since the tender concerned a very limited portion of the Italian market.

The ICA fines four operators and a facilitator for collusive behavior in the waste collection sector

On January 30, 2019, the ICA found that four companies rigged a public tender for regional waste collection and disposal.[15] According to the ICA, the collusion was facilitated by the intervention of a third-party consulting firm, which encouraged and coordinated the parties' collusive behavior. In line with EU precedent, the ICA imposed a fine also on the facilitator.[16]

[13] *Gara d'appalto per la sanità per le apparecchiature per la risonanza magnetica* (Case I729), ICA, decision of August 4, 2011.

[14] Council of State, judgment No. 318/2019.

[15] *Gara SO.RE.SA. rifiuti sanitari Regione Campania* (Case I816), ICA, decision of January 31, 2019.

[16] *AC-Treuhand* (Case C-194/14 P) EU:C:2015:717.

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